



**OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN**

**GERALD C. MANN
ATTORNEY GENERAL**

**Hon. R. G. Waters, Commissioner
Board of Insurance Commissioners
Austin, Texas**

Dear Sir:

Opinion No. O-2049

Re: May the Board of Insurance Commissioners legally approve the plan of operation and endorsement as requested by the American General Insurance Company requiring that the endorsement be attached to policies for risks of given size or greater and may not be attached to risks of less than the given size?

Your recent request for an opinion of this department on the above stated question has been received.

We quote from your letter as follows:

"Application has been made to this Department by a duly licensed workmen's compensation writing company for approval as its plan of operation for writing workmen's compensation insurance, a participation and assessment plan whereby risks of a given size and larger will be written on a participation and assessment basis and risks of less than the given size will not be written on said participation and assessment basis.

"The Attorney General held in an opinion dated December 18, 1926, that a company could not use a participation and assessment plan of operation which would apply to some of its policies but not to all its policies,

Hon. R. G. Waters, Page 2

the selection of those to which it would apply to lie within the discretion of the carrier.

"The Attorney General held in an opinion dated December 16, 1938, that the Retrospective Rating Plan could be legally adopted by which risks of a given size and larger could elect a plan whereby they would participate or be assessed in accordance with their individual experience and that risks of less than the given size would not be eligible.

"In view of the two opinions mentioned, we request your opinion as to whether or not there is any legal barrier to our approval of the plan of operation and endorsement as requested by the said carrier which plan will require that the endorsement be attached to policies for risks of given size or greater and may not be attached to risks of less than the given size."

The proposed endorsement to be attached to policies for risks of a given size or greater and which may not be attached to risks of less than the given size, reads as follows:

"PARTICIPATION AND ASSESSMENT
ENDORSEMENT

"The assured will pay the Company the manual or experience rates of premiums applicable to this policy as promulgated by the Board of Insurance Commissioners of Texas, (1) if the premiums so paid are insufficient to provide for the payment of, (a) all paid and incurred losses, including legal and other expenses incidental thereto arising under this policy; and (b) such per cent of all premiums as may be agreed upon between the assured and the Company, which per cent shall be retained by the Company; the assured will pay to the Company upon demand, such additional amounts

Hon. R. G. Waters, Page 3

as may be necessary to provide adequate reserves computed as prescribed by the Board of Insurance Commissioners under the insurance laws of the State of Texas. (2) If the premium so paid shall prove to be more than sufficient to so provide for the payment of the charges mentioned in (a) and (b) of (1), and the maintenance of adequate reserves computed on all policies as stated in 2 hereof, The Company will return the excess to the assured, according to such plans as may be adopted by the Company, as and when such return shall be approved by the Board of Insurance Commissioners of Texas. (3) The payments provided to be made under (1) and (2) above shall be made after the expiration of the year's period for which the policy is written and provided all premiums hereunder have been paid, and not otherwise. This endorsement shall not apply on policies, (a) the estimated annual premium of which, as shown on the policy, is less than Five Thousand Dollars (\$5,000.00), or (b) policies to which is attached the Retrospective Rating Plan Endorsement. This Endorsement, when countersigned by a duly authorized Agent of the Company and attached to Policy No. WC _____, Issued to _____ by the American General Insurance Company, shall be valid and form a part of said policy.

"Countersigned at _____
 This _____ day of _____, 19____
 _____, Agent GUS S. WORTHAM
 President"

As shown by the proposed endorsement, above quoted, the plan of operation is to write all assureds whose estimated annual premiums exceed \$5,000.00, and who have not elected to be rated under the Retrospective Rating Plan upon the basis of an individually applied plan of participation and assessment as appears from the form of endorsement. However, the above mentioned plan specifically

Hon. R. G. Waters, Page 4

prohibits all whose estimated annual premium is less than \$5,000.00 from participating in or operating under such plan. Articles 4907, 4908, 4911, 4913, 4914 and 4916 of Vernon's Civil Annotated Statutes read as follows:

"Art. 4907. The said Commission shall make, establish and promulgate all classifications of hazards and rates of premium respectively applicable to each, contemplated and provided for by Title 130, known as the Workmen's Compensation Law and/or by the 'Longshoremen's and Harbor Workers' Compensation Act' as enacted by the Congress of the United States. Said Commission shall publish all rates promulgated by it as affecting Compensation Insurance in this State, and said rates, or any change therein, shall be published fifteen days before they become effective and in force.

"Art. 4908. The Commission shall prescribe standard policy forms to be used by all companies or associations writing workmen's compensation insurance in this State. No company or association authorized to write workmen's compensation insurance in this State shall, except as hereinafter provided for, use any classifications of hazards, rates or premium, or policy forms other than those made, established and promulgated and prescribed by the Commission.

"Art. 4911. The Commission shall determine hazards by classes and fix such rates of premium applicable to the payroll in each of such classes as shall be adequate to the risks to which they apply and consistent with the maintenance of solvency and the creation of adequate reserves and a reasonable surplus, and for such purpose may adopt a system of schedule and experience rating in such manner as to take account of the peculiar hazard of each individual risk, provided such rate shall

Hon. R. G. Waters, Page 5

be fair and reasonable and not confiscatory as to any class of insurance carriers authorized by law to write workmen's compensation insurance in this State. To insure the adequacy and reasonableness of rates, the Commission shall take into consideration an experience gathered from a territory sufficiently broad to include the varying conditions of the industries in which the classifications are involved, and over a period sufficiently long to insure that the rates determined therefrom shall be just, reasonable, and adequate rates. The Commission shall exchange information and experience data with the rate-making bodies of other States and shall consult any national organization or association now or hereafter existing for the purpose of assembling data for the making of compensation insurance rate.

"Art. 4913. The Commission shall prescribe a uniform policy for workmen's compensation insurance and no company or association shall thereafter use any other form in writing workmen's compensation insurance in this State, provided that any company or association may use any form of endorsement appropriate to its plan of operation, if such endorsement shall be first submitted to and approved by the Commission, and contracts or agreements not written into the application and policy shall be void and of no effect and in violation of the provisions of this chapter, and shall be sufficient cause for revocation of license to write workmen's compensation insurance within this State.

"Art. 4914. Nothing in this chapter shall be construed to prohibit the operation hereunder of any stock company, mutual company, reciprocal or inter-insurance exchange, or Lloyd's association, to prohibit any stock company, mutual company, reciprocal, or inter-insurance exchange or Lloyd's association,

Hon. R. G. Waters, Page 6

issuing participating policies, provided no dividend to subscribers under the Workmen's Compensation Act shall take effect until the same has been approved by the Commission. No such dividend shall be approved until adequate reserve has been provided, said reserves to be computed on the same basis for all classes of companies or associations operating under this chapter, as prescribed under the insurance laws of the State of Texas.

"Art. 4916. No provisions of the Act creating the State Insurance Commission, with regard to the fixing and promulgation of rates for fire insurance or the prescribing of fire insurance policies and forms shall be applicable to the fixing of compensation insurance classifications or the making of compensation insurance rates or the prescribing of compensation insurance policy forms; but the provisions of this Act shall be construed and applied independently of any other law or laws, or parts of laws, having to do with the matter of insurance rates and forms or of fixing the duties of the State Insurance Commission."

Under the above quoted statutes it is the duty of the Board of Insurance Commissioners to prescribe rates and all policy forms that every company writing compensation insurance must use and such companies are required to use such rates and forms. Apparently, the general policy of the Legislature and all insurance legislation is to prevent discrimination by the carrier between its policyholders. As we understand the above mentioned plan, it is nothing more than or less than a specific discrimination between the policyholders of the company, and the plan of operation is contrary to the policies of the Legislature in such matters.

This department held in an opinion dated December 18, 1926, that a company could not use a participation and assessment plan of operation which would apply to some of

Hon. R. G. Waters, Page 7

its policies but not to all of its policies, the selection of those to which it would apply to lie within the discretion of the carrier.

In view of the policies of the Legislature expressed by the foregoing statutes, your question is respectfully answered in the negative.

The opinion of the Attorney General, bearing date of December 16, 1938, holding that the retrospective rating plan can be legally adopted by which risks of a given size and larger could elect a plan whereby they would participate or be assessed in accordance with their individual experience and that risks of less than the given size would not be eligible, is hereby expressly overruled.

Trusting that the foregoing fully answers your inquiry, we remain

Very truly yours

ATTORNEY GENERAL OF TEXAS

By (s) *Ardell Williams*
Ardell Williams
Assistant

AW:AW

APPROVED MARCH 27, 1940

(s) *Gerald C. Mann*
ATTORNEY GENERAL OF TEXAS

APPROVED, OPINION COMMITTEE

By B. W. B.
Chairman